DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(4)

PROCEEDINGS AND ORDERS DATE: 120485

CASE NBR 85-1-00058 CSX CASE STATUS: DECIDED
SHORT TITLE Moran, James, etc., et al. DOCKETED: Jun 17 1985
VERSUS Pima County, et al.

Entry	Date	Note	Proceedings and Orders
1	Jun 17 1985	D	Petition for writ of certiorari filed.
2	Aug 14 1985		DISTRIBUTED. September 30, 1985
3	Sep 4 1985	F	Response requested -- BRW.
4	Oct 4 1985		Brief of respondent Pima County in opposition filed.
5	Oct 9 1985		REDISTRIBUTED. November 1, 1985
7	Nov 4 1985		REDISTRIBUTED. November 8, 1985
8	Nov 12 1985		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

1PP

PETITION FOR WRIT OF CERTIORARI

85- 58 (1)

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JAMES MORAN, as father to his minor son, MICHAEL MORAN and guardian to his adult son, THOMAS MORAN; KAREN BARKE, in and for herself and her minor daughter, TINA BARKE,

v.

PIMA COUNTY, a body politic organized under the laws of the State of Arizona; PIMA COUNTY SHERIFF CLARENCE DUPNIK, in his capacity as Pima County Sheriff; SGT. TONY CALLAN, individually and as a Sheriff's Deputy; DEPUTY TIM HUGHES, individually and as a Sheriff's Deputy; and JOHN DOES 1 through 10, individually and as Pima County Sheriff's Deputies

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

WILLIAM G. WALKER, ESQ.
STOMPOLY & EVEN, P.C.
120 West Broadway, Suite 370
P. O. Box 3017
Tucson, Arizona 85702-2781
602-792-2781
Counsel for Petitioner

6/17/85

74P

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JAMES MORAN, as father to his minor son, MICHAEL MORAN and guardian to his adult son, THOMAS MORAN; KAREN BARKE, in and for herself and her minor daughter, TINA BARKE,

v.

PIMA COUNTY, a body politic organized under the laws of the State of Arizona; PIMA COUNTY SHERIFF CLARENCE DUPNIK, in his capacity as Pima County Sheriff; SGT. TONY CALLAN, individually and as a Sheriff's Deputy; DEPUTY TIM HUGHES, individually and as a Sheriff's Deputy; and JOHN DOES 1 through 10, individually and as Pima County Sheriff's Deputies

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

WILLIAM G. WALKER, ESQ.
STOMPOLY & EVEN, P.C.
120 West Broadway, Suite 370
P. O. Box 3017
Tucson, Arizona 85702-2781
602-792-2781
Counsel for Petitioner

6/17/85

QUESTIONS PRESENTED

1. Whether the state courts of Arizona improperly applied federal law in upholding a trial court's decision to deny any attorney fees, without explanation of findings of special circumstances, when presented with a claim for attorney fees by a prevailing plaintiff under 42 U.S.C §1988.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

MORAN
v.
PIMA COUNTY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

William G. Walker, on behalf of the Plaintiff, Moran, hereby petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court and Arizona Court of Appeals in this case.

OPINIONS BELOW

1. Moran v. Pima County, et al., 2 CA-CIV 5009 (January 2, 1985, Div. II, Arizona Court of Appeals). Appendix pg 22a-31a.

2. Petition for Review to Arizona Supreme Court, denied. See Appendix pg 32a.

JURISDICTION

The opinion of the Court of Appeals was entered on January 2, 1985. The Petition for Review was denied on March 19, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1988. Appendix pg 20a-21a

STATEMENT OF CASE

Petitioner in interest, Michael Moran, a young Mexican male, brought suit against the Sheriff's Department of Pima County, Arizona alleging that they had violated his civil rights. The lawsuit was brought pursuant to 42 U.S.C. § 1983 and § 1988.

The basic facts of the case indicate that Petitioner, playing video games at a miniature golf course, was arrested and detained by Pima County Sheriff officers who were looking for a young Mexican male wearing a white t-shirt and blue jeans. During the process of the arrest and detention, other members of Petitioner's family became involved and there was an altercation with the police. Petitioner

received no serious injuries as a result of the arrest and short detention, with the exception of three very small scars on one shoulder.

The jury awarded Petitioner $500.00 as compensation for his injury. Petitioner then made application for an award of attorney fees which was denied, without explanation or any indication of a finding of special circumstances by the trial court. Petitioner appealed this summary denial of attorney fees.

The incident out of which the claim arose occurred in May of 1980 and the complaint in this case was subsequently filed in Pima County Superior Court on May 26, 1981. See Appendix pg. 1a-8a. Jury trial in this case occurred during April of 1983. The trial revolved around the factual issues of Michael Moran's (a minor) arrest, initial apprehension and continued detention.

At the conclusion of trial, counsel for Petitioner filed a motion requesting an evidentiary hearing on attorney's fees. The court, by way of minute order on May 23, 1983, summarily denied any award of attorney's fees by ruling that Petitioner's Motion for Attorney's Fees and Petitioner's Motion for Evidentiary Hearing regarding the proper amount of attorneys fees to be awarded was denied. See Appendix pg. 9a.

Judgment was entered on June 30, 1983, in favor of Plaintiff, James Moran, on behalf of his son, Michael Moran, in the amount of $500.00. In that judgment, the court indicated that non-jury costs should be assessed against the Defendants. Appendix pg. 10a-11a.

In order to complete the factual record for an appeal of the attorneys fees question, Petitioner's counsel submitted an Offer of Proof Re: Attorney's Fees on July

15, 1983, which consisted of affidavits of Petitioner's trial counsel, Barry Kirschner, and a local attorney, Elliot Glicksman, concerning the reasonableness and appropriateness of granting fees in this particular civil rights case and asking for $13,104.90 in attorney fees. See Appendix pg. 12a-19a.

Petitioner filed a Notice of Appeal from the decision of the trial court on September 8, 1983. Division Two of the Arizona Court of Appeals rendered its opinion in the case on January 2, 1985. The Court of Appeals found that the trial judge improperly failed to specify the reasons for his denial of an award of attorney fees in a civil rights case. However, the Court of Appeals in its decision, independently reviewed the record and listed two reasons which it considered justified a denial of attorney fees in the case: That a $500.00 damage award was a

nominal amount and second, that the § 1983 action was nothing more than a state common law claim of false arrest and simple assault fit within the civil rights laws.

Petitioner filed a Petition for Review with the Supreme Court of Arizona on January 17, 1985. The Supreme Court of Arizona denied the Petition for Review on March 19, 1985.

ARGUMENT I

THE ARIZONA APPELLATE COURTS HAVE DECIDED A FEDERAL QUESTION RELATING TO 42 U.S.C. § 1988 IN A MANNER CONTRARY TO EXISTING FEDERAL LAW.

The Supreme Court of Arizona declined to review a decision of Division Two of the Arizona Court of Appeals, which opinion therefore became the law of the state. There are several areas in which that opinion transgresses federal law. First, the Appellate Court undertook a review of the written record to reach a completely independant determination as to whether or

not there should have been an award of attorney fees in a civil rights case. The clear federal rule is that such discretion rests with the trial judge and not with Appellate Courts. Second, the opinion wrongly holds that a damage award of $500.00 is a nominal amount which does not justify an award of attorney fees in a civil rights context. Third, the opinion incorrectly finds that attorney fees may be properly denied in a civil rights case if that cause of action could have also been framed as a state common law tort.

Prior to discussing the specifics of the errors claimed by Petitioner, it is important to consider the philosophical underprintings and rationale behind 42 U.S.C. §1988.

The legislative history indicates that Congress intended that successful plaintiffs should ordinarily recover an attorney's fee

unless special circumstances would render such an award unjust. Senate Report No. 94-1011. Congress specifically outlined the rationale behind its desire to ensure that attorney fees be awarded to prevailing parties in civil rights cases:

> It does not change the statutory provisions regarding the protection of civil rights except as it provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing statutes. There are very few provisions in our federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes to great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements, which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

Senate Report No. 94-1011 page 6.

Specifically, in the area of police misconduct, attorney fees are necessary in order to allow an aggrieved person the

opportunity to be fully and fairly represented in light of the recognized fact that any damage awards are likely to be small because of the general sentiment against suing the police for performing their official functions. See Robinson v. Goff, 517 F.Sup. 350, 357 (W.D.V. 1981); Konczak v. Tyrrell, 603 F.2d 13 (7th Cir. 1979); Pugh v. Rainwater, 465 F.Sup. 41 (S.D. Fl. 1979); Wallace v. King, 650 F.2d 529 (4th Cir. 1981).

There are two separate and distinct decisions which must be made when a court faces the question of whether or not attorney fees are properly awarded pursuant to 42 U.S.C. § 1988. First, and the one at issue in this case, is the threshold determination that must be made by the court whether or not an award of attorney fees is proper in that particular case. The second determination the court must make, assuming

that it found an award of fees to be proper, is what amount of fees should be granted.

In Hensley v. Eckerhart, ____ U.S. ____, 103 S.Ct. 1933 (1983), this Court set forth the standard for making the threshold determination as:

> A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978). This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the District Court to determine what fee is "reasonable."

Hensley, supra, 103 S.Ct. at 1939. (Footnote omitted)

There is no dispute that Petitioner, Michael Moran was a prevailing party in this case. The Court of Appeals based its decision in this case upon its De Novo finding that there existed special

circumstances which justified the denial of attorney fees by the trial court.

An analysis of the Arizona court's opinion in this case in light of the relevant federal standards under § 1988 will clearly demonstrate the need for this Court's intervention by either granting the Writ of Certiorari or summarily remanding the case to the trial court level for a proper determination of the attorney fee award.

A

THE ARIZONA COURT OF APPEALS DISREGARDED RELEVANT FEDERAL LAW BY FINDING ON THE ONE HAND THAT THE TRIAL COURT HAD FAILED TO MAKE THE NECESSARY FINDINGS ON THE RECORD WHICH WERE REQUIRED BY FEDERAL LAW AND ON THE OTHER BY DECIDING THE ISSUE OF ATTORNEY FEES BY ITS OWN DE NOVO REVIEW OF THE RECORD.

In this case the Court of Appeals held that the trial court had failed to make the necessary findings pursuant to federal law. See Appendix pg. 29a-30a. However, instead

of remanding the case to the trial judge for determination and specification as required by federal law the Appellate Court made its own review of the record and listed reasons as to why the trial court may have been justified in denying an award of fees. In so doing, the Arizona Court of Appeals violated the federal guidelines on the award of attorney fees pursuant to §1988. Those guidelines require that the trial court exercise its discretion in determining the appropriateness of an attorney fees award in §1988 cases.

This Court, in Hensley v. Eckerhart, supra, indicated:

> We reemphasize that the District Court has discretion in determining the amount of a fee award. This is appropriate in view of the District Court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. It remains important, however, for the District Court to provide a concise but clear explanation of its reasons for

> the fee award. When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the District Court should make clear that it has considered the relationship between the fee awarded and the results obtained.

Hensley, supra, 103 S.Ct. at 1941-1942.

Indeed, in Hensley, this Court specifically deferred to the District Court the determination of whether or not the Petitioners had prevailed on the merits of their case when it noted:

> 6. The parties disagree as to the results obtained in this case. Petitioners believe the Respondents 'prevailed only to an extremely limited degree.' Brief for Petitioners at 22. Respondents contend that they 'prevailed on practically every claim advanced.' Brief for Respondents at 23. As discussed in part 4, infra, we leave this dispute for the District Court on remand.

Hensley v. Eckerhart, supra, 103 S.Ct. at 1939, footnote 6. Thus, in Hensley, this Court found that the initial decision on the award of attorney fees must be made by the

trial court with a concise but clear explanation of its reasons for the fee award.

This rule was also clearly and succinctly set forth by the Seventh Circuit Court of Appeals in Murphy v. Kolovitz, 635 F.2d 662 (7th Cir. 1981). Murphy involved the police detention of a 12 year old boy whose mother subsequently brought suit against the officer for violations of her son's constitutional rights. The mother was successful in her claim of unjustifiable force, and the court awarded compensatory damages of $2,000.00. However, she failed to prove her claim of false arrest. Her motion requesting attorney's fees and costs was denied without comment. Murphy, supra, 635 F.2d at 663. After noting that a prevailing party does not have to have success on every issue raised in a lawsuit, the court indicated:

As Appellant prevailed in a practical sense, an award of fees should ordinarily be granted "as a matter of course" absent circumstances which would render them adjust. Davis v. Murphy, 587 F.2d 362, 364 (7th Cir.1978). The existence of such circumstances should be identified when attorney's fees are denied to a prevailing party. Following the lead of numerous circuits in cases involving both statutory and equitable awards of attorney fees, the First Circuit announced the following rule for awards under §1988:

> But we do hold that the summary disposition of a threshold question of entitlement in an informal unrecorded settlement conference followed by the issuance of order denying counsel fees without an adequate statement of the reasons for the order does not meet minimum standards of procedural fairness and regularity. [Citations omitted.] Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion. Sargeant v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978). Murphy, supra, 635 P.2d at 663-664.

The Murphy Court then went on to indicate that the Ninth Circuit had reached the same

conclusion in Sethy v. Alamedia County Water District, 602 F.2d 894, 897 (9th Cir. 1979). The court then held:

> The reasoning of these courts is applicable to the case at hand. The District Court gave no explanation for its order denying fees to appellant's counsel. Although the act makes an award discretionary, the language in Newman has been accepted as a clear limit. See Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979). This Court cannot perform its function of delimiting the scope of discretion where there is no reason given for the decision below. Although we believe the rule developed in the other circuits is the rule to be followed in this circuit, we do not intend to say that the rule must always be rigidly applied to require that the 'special circumstances' always be neatly packaged and labeled on the record to avoid reversal if the 'special circumstances' are otherwise clearly and unarguably recognizable in the record as developed by the trial judge. Any special circumstances there may be are not apparent to us from the record.

Murphy, supra, 635 F.2d at 664.

Therefore, the prevailing plaintiff should not only receive fees "almost as a matter of course," Konczak v. Tyrrell,

supra, 603 F.2d at 19 but when a trial court determines that attorney fees should not be awarded it must specify the reasons and special circumstances which justify the denial of an award of attorney fees. See: Miles v. Sampson, 675 F.2d 5 (1st Cir. 1982)(trial court, because of familiarity with case and work that went into it on both sides, is the proper place for a decision regarding attorney fees); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975)(meaningful review of attorney fees decision impossible because the District Court record was devoid of information as to the factors considered by the court in making its determination.)

Not only is it the clear federal rule that it is up to the trial court to delimit the special circumstances which may exist if it denies an award of fees but the requirement that the trial court specify its

specific findings also applies to the second half of the two part procedure of awarding fees concerning the amount of the fee to be awarded. See Louisville Black Police Officers Organization, Inc. v. City of Louisville, 700 F.2d 268 (6th Cir. 1983); Harkless v. Sweeny Independent School District, etc., 608 F.2d 594, 596 (5th Cir. 1979); Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624, 636 (6th Cir. 1979).

In Petitioner's case there is no doubt indeed, the Arizona Court of Appeals recognized, that the trial court abused its discretion by failing to enumerate the specific special circumstances which it found to exist which would justify its decision to deny and award of attorney fees. The clear and proper procedure under §1988 in such a case is to remand it to the trial court with specific instructions that the

court make the necessary findings concerning the propriety of an attorney fee award. Petitioner contends that the judgment it obtained in this case was a significant and important vindication of his constitutional rights. The government, of course, contends that Petitioner barely prevailed. As in Hensley, the proper forum for resolving such a dispute is at the trial court level and not in the Appellate Courts.

In light of the clear failure of the Arizona Court of Appeals to follow the correct federal procedure, this Court should summarily remand this case to the trial court for a proper determination on the question of attorney fees or in the alternative grant this Petition for Certiorari.

B

THE FACTORS RELIED UPON BY THE ARIZONA COURT OF APPEALS IN UPHOLDING THE DENIAL OF THE ATTORNEY FEES DO NOT CONSTITUTE SPECIAL CIRCUMSTANCES WITHIN THE MEANING OF §1988.

Even if this Court finds that an appellate tribunal can properly make an independent and unguided determination on the question of awarding attorney fees, the factors relied upon by the Arizona Court of Appeals do not rise to the level of special circumstances justifying a denial of attorney fees under §1988.

1

THE SIZE OF THE DAMAGES AWARDED IN THIS CASE ARE NOT A SPECIAL CIRCUMSTANCE JUSTIFYING A DENIAL OF AN AWARD OF ATTORNEY FEES.

The main reason relied upon by the Arizona Court of Appeals as justification for the denial of an award of attorneys fees is the fact that Petitioner was awarded

$500.00 as damages. The Court of Appeals found that such damages were merely nominal, justifying a denial of attorney fees. See Appendix pg. 25a-27a. Such a ruling, if allowed to stand, would sound the death knell of civil rights litigation in the State of Arizona.

The entire purpose behind §1988 was to ensure that the civil rights laws of this country could be enforced by the private citizen. The practical import of the Court of Appeals decision in this case is to establish that in the State of Arizona, unless a plaintiff has suffered extensive damages as a result of the violation of their constitutional rights, they will not be entitled to attorney fees. The importance of an award of attorney fees in civil rights cases has repeatedly been emphasized by this Court, lower federal courts and commentators. See University of

Detroit Journal of Urban Law, Vol. 58, page 365, 1981.

Attorneys will simply no longer take civil rights cases in which there are not significant actual damages. Thus, the Court of Appeals of Arizona has effectively created a large class of people and cases which involve very real civil rights violations in which the individual citizen will have no redress in the courts. The example of such cases are obvious; e.g. the search of a persons automobile without probable cause or other motivation beyond harassment. In such a case an attorney would be hard pressed to convince a jury that there were substantial compensatory damages. However, a very real and important constitutional right has been violated. Under the rule as it now exists in Arizona, a trial court would commit error by awarding attorney fees in such a case. Not only does

the Court of Appeal's decision in this case contravene the intent and purpose of §1988 but it is also counter to established federal law.

This court, in Hensley v. Eckerhart, established that the nature of the relief and the results obtained is a factor to consider in determining the size of an attorney fees award as opposed to evaluating that factor, as a special circumstance justifying a denial of an award. Hensley, supra, 103 S.Ct. at 1942. Thus, in this particular case, the trial court could look at the results obtained in evaluating what amount of attorney fees are to be awarded. Some attorney fees are warranted to a prevailing plaintiff in a police misconduct case where there are not significant actual damages. The federal case law indicates that the small award, in and of itself, is

not a special circumstance justifying denial of a fee award.

The Fifth Circuit Court of Appeals in Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980), indicated that:

> Even where the victory is only the vindication of the correctness of the plaintiff's position and, therefore, may be characterized as moral vindication, counsel's fees may be awarded. Rainey v. Jackson State College, 551 F.2d 672, 776-77 (5th Cir. 1977).

Knighton, supra, 616 F.2d at 799.

In Drake v. Perrin, 593 F.Sup. 1176 (E.D. Penn. 1984) the court found that based upon this Court's decision in Hensley, supra, that a plaintiff would prevail whenever they obtained a verdict, no matter how minimal. Drake, supra, 593 F.Sup. at 1177. The court then went on to find that as the plaintiff's success was a $2.00 verdict from the jury that reasonable attorney fees would be 100 times the verdict or $200.00. Drake, supra,

593 F.Sup. at 1179. The District Court in Drake correctly applied this Court's analysis in Hensley by finding that a prevailing party would be entitled to an attorney fees award and then applying the results obtained in calculating the amount of that award.

Similarly in Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981) the court found that a party may be considered a prevailing party for purposes of an attorneys fee award when it prevails on a constitutional claim and is awarded only $1.00 in damages. Likewise, in Robinson v. Goff, 517 F.Sup. 350 (W.D.V. 1981) the court awarded $1,500.00 in attorney fees in a case in which the plaintiff had received a $29.20 judgment. Both the Drake decision and the Robinson decision arose in cases where the allegations concerned police misconduct.

In another police misconduct case, the Fourth Circuit Court of Appeals found that attorney fees were properly awarded in a case where the plaintiff had received only a $5.00 verdict. See Fox v. Parker, 626 F.2d 351 (4th Cir. 1980). In Dean v. Gladney, 451 F.Sup. 1313 (S.D. Tex. 1978) the court was faced with allegations of police misconduct on behalf of several plaintiffs. The facts in that case indicate significant examples of police abuse resulting in relatively small awards -- in one case as low as $1,000.00. The Court in Dean correctly analyzed the attorneys fees issue and found that no special circumstances existed which would justify a denial of an award of attorney fees. Dean, supra, 451 F.Sup. at 1322.

The Eighth Circuit also follows the general rule and held that even a lack of success on a major constitutional claim

would not be bar to an award of attorney's fee. See Reproductive Heath Services v. Freeman, 614 F.2d 585, 600 (8th Cir. 1980). Thus, the Federal Courts have repeatedly recognized that minimal damages are the norm in police misconduct cases.

The federal rule as established by the above precedent indicates that the Appellate Court of Arizona was incorrect in finding that a $500.00 damage award was a special circumstance which would justify a denial of an award of attorney fees. In this particular case, Petitioner did not have any type of any serious physical injury. The improper detention did not last for a lengthy period of time. Moreover, there was significant testimony at the trial on behalf of the officers in question which indicated that the Petitioner and his family's own action in resisting the effort of the police may have caused some of the trouble. In

light of the facts of the case, Petitioner's $500.00 is not a special circumstance justifying a denial and an award of attorney fees. It may of course, be considered by the trial court on remand as a factor in deciding the exact amount of attorney fees to be awarded.

There is no doubt that §1983 actions alleging police impropriety and misconduct are an important and necessary safeguard of the rights of the American citizen. The commentators on the subject have repeatedly indicated that even with the protections of §1983, such factors as jury bias, the age, race, and social background of the Petitioner and society's inherent respect for the police all serve to minimize the amount of damages which any jury will award. See, Project: Suing the Police in Federal Court, Yale Law Journal, Vol. 88, No. 4, March 1979, page 780; University of Detroit

Journal of Urban Law, supra; The Black Law Journal, Vol. 7, page 180-200, Fall 1980.

The ability to protect one's constitutional rights through access to the courts is an important and fundamental protection of the American ideal of liberty and justice. This Court should not allow a state to establish a rule that would effectively bar access to the courts for individuals whose constitutional rights have been violated but who have not suffered severe economic or serious personal injury.

THE COURT OF APPEALS INCORRECTLY FOUND THAT THE EXISTENCE OF STATE COMMON LAW CAUSES OF ACTIONS AND REMEDIES IN PETITIONER'S CASE WAS A SPECIAL CIRCUMSTANCE JUSTIFYING DENIAL OF AN ATTORNEYS FEE AWARD.

The only other special circumstance listed by the Court of Appeals as a special circumstance was the fact that Petitioner's § 1983 claim could have also been couched a

traditional tort law doctrine. This finding of the Court of Appeals is directly in conflict with rules established by this Court.

This Court has repeatedly held that a plaintiff is not required to exhaust state judicial or administrative remedies under §1983. See Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (S.Ct. 1982); Steffel v. Thompson, 415 U.S. 452, 472-73 (S.Ct. 1973); McNeese v. Board of Education, 373 U.S. 668, 671 (S.Ct. 1962).

The Eighth Circuit Court of Appeals in Garmon v. Foust, 668 F.2d 400 (1982) cert. denied 102 S.Ct. 2283 (1982) outlined the federal rule:

> We agree and reject the tort analogy because it unduly cramps the significance of §1983 as a broad, statutory remedy. Section 1983 provides a cause of action for deprivation of civil rights that in no way depends upon state common law. A litigant may pursue a §1983 action rather than or in addition to, state

remedies. In his concurrence in Monroe v. Pape, 365 U.S. 167 (1961), Justice Harlan described the difference between a state tort suit and a §1983 action.

> [A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. . ." Garmon, supra, 668 F.2d at 406. (Footnotes omitted)

The mere fact that Petitioner may have brought his claim as one sounding in state tort law should not preclude him from bringing the claim as a §1983 action and therefore, that factor cannot be relied upon as a special circumstance justifying a denial of an award of attorney fees. If this Court allows the state court's opinion to stand, plaintiffs in §1983 actions will never be able to obtain attorney fees where their suit could also have been brought as a common law tort or other state form of relief. The Arizona rule as it now exists

by virtue of the Court of Appeals decision has the practical effect of forcing a denial of an award of attorney fees in almost any civil rights case that could be imagined. Such a rule frustrates the entire purpose of §1983 and §1988 and disregards the rulings of this Court and the lower federal courts.

CONCLUSION

Petitioner requests that in light of the fact that the Arizona rule as established by the Court of Appeals in this case is so directly in conflict with the clear federal law under §1988 that this Court summarily remand the case to the trial court pursuant to proper federal guidelines. In the alternative, Petitioner requests this Court grant their Writ of Certiorari. As it stands now, the new Arizona rule sounds the death knell of a citizen's right to seek redress for constitutional violations. The decision of the Court of Appeals basically

has the practical effect of barring from court everyone who is not either wealthy enough to pay an attorney's an hourly fee for their work on the case or one who has significant damages arising from a scenario that does not also constitute a state common law cause of action. Petitioner prevailed in this case and is entitled to an award of attorney fees. The question of the extent of Petitioner's success is a matter resting within the sound discretion of the trial court and is only an important factor for the court to consider in deciding the amount of an award.

Respectfully submitted this _____ day of June, 1985.

William G. Walker
Counsel of Record

CERTIFICATION OF MAILING

1. My name is William G. Walker and I am the attorney for the Petitioner before this Court.

2. That on June 17, 1985 a member of the staff of my law firm, STOMPOLY & EVEN, P.C., deposited in the United States mail, with first-class postage prepaid addressed to the Clerk of the Supreme Court, 40 copies of our Petition for Writ of Certiorari in Moran v. Pima County, and 3 copies to the Pima County Attorneys Office.

3. To my knowledge, the mailing took place on June 17, 1985 within the time permitted for filing a Petition for Writ of Certiorari, appealing the decision of the highest court of the State of Arizona.

WILLIAM G. WALKER

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

SUBSCRIBED AND SWORN TO before me this 17 day of June, 1985, by WILLIAM G. WALKER, attorney for Petitioner.

Notary Public

My Commission Expires:

June 3, 1986

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

JAMES MORAN, as father to his minor son, MICHAEL MORAN and guardian to his adult son, THOMAS MORAN; KAREN BARKE, in and for herself and her minor daughter, TINA BARKE,	NO. 194821
Plaintiffs,	
vs.	COMPLAINT
PIMA COUNTY, a body politic organized under the laws of the State of Arizona, PIMA COUNTY SHERIFF CLARENCE DUPNIK, in his capacity as Pima County Sheriff; SGT. TONY CALLAN, individually and as a Sheriff's Deputy; DEPUTY TIM HUGHES, individually and as a Sheriff's Deputy; and JOHN DOES 1 through 10, individually and as Pima County Sheriff's Deputies,	(Tort - Non-Motor Vehicle)
Defendants.	

Plaintiffs allege:

I

This action is brought pursuant to 42 U.S.C. §1981, 1983 and 1988, the First, Fourth, Fifth and Fourteenth Amendments, and Arizona law. Plaintiffs James Moran

and Karen Barke are citizens and residents of the State of Arizona, as are Michael Moran, Thomas Moran and Tina Barke.

II

Pima County is a body corporate and politic organized and existing under the laws of the State of Arizona.

III

All Defendants other than Pima County reside in the State of Arizona and have caused an act or event to occur in Pima County, Arizona. All Defendants owe a duty to all Plaintiffs to act reasonably and in accord with the laws of the United States and the State of Arizona.

IV

Defendant, Sheriff Clarence Dupnik, is an agent of Pima County, as are all the individual defendants named in this complaint. For all allegations in this complaint, each was acting under color of law and under color of their authority as Sheriff and/or Deputy Sheriffs of Pima County.

V

Sheriff Deputies Defendants, Callan, Hughes and Does I through 10, were either at the scene of the wrong doings alleged herein, or otherwise participated in willful or negligent, tortuous acts and are responsible for wrong doing against Plaintiffs as alleged herein. The true names of Does I through 10 are not now known by Plaintiffs, although Plaintiffs' counsel has requested their names be provided by counsel for Defendant, Pima County Sheriff. Sgt. Callan is a supervisory employee of the Pima County Sheriff's office.

VI

On or about May 27, 1980, at approximately 8:30 p.m., Plaintiffs Thomas Moran, Michael Moran, Karen Barke and Tina Barke were peacefully patronizing a business known as "Golf & Things" located on Tanque Verde Road in Pima County, Arizona.

VII

Defendant Callan, Hughes, or Deputy

Sheriff Doe #1, unknown by name, grabbed Michael Moran from behind and forced him out of the establishment. Defendant Callan, Hughes, or Deputy Sheriff #1 used excessive and unreasonable force.

VIII

Michael Moran and all other Plaintiffs had committed no illegal act at the time of his detention. At no time did he use any force or resistence except that which was necessary to protect himself from the unlawful acts of the Defendants.

IX

As Michael Moran was being pulled from the establishment by his hair, Thomas Moran asked to see what was going on. Thomas was then physically restrained with excessive use of force by unknown Sheriff's Deputies of Pima County.

X

After Tina Barke, at the time ten years old, attempted to bring to the attention of Defendants that they made a mistake in

apprehending the Moran's, one Deputy told her words to the effect that "if you don't shut up, I will shove you in the trunk and suffocate you."

XI

Defendants at Golf & Things made other threatening remarks to Karen and Tina Barke.

XII

The remarks of Defendants put the Barke's in reasonable fear for their well-being and caused great emotional distress.

XIII

The remarks of Defendants alleged above were intentionally uttered to produce fear and mental distress in Plaintiffs.

XIV

Both Thomas and Michael Moran were injured by the excessive use of police force. Michael Moran was taken to a hospital for observation.

XV

The acts described above constitute a breach of duties owed by Defendants to

Plaintiffs; an unlawful arrest, excessive use of force; assault and battery; intentional infliction of mental distress; false imprisonment; gross negligence; and were done wantonly, willfully and with malice.

XVI

Actions of each and every Defendant resulted from and were taken pursuant to a de facto policy of the Pima County Sheriff which is implimented by Sheriff Deputies of that County to summarily punish persons who refuse to obey orders of Sheriff Deputies, whether unlawful or not, by means of unlawful arrest, detention and excessive use of force.

XVII

The existence of the de facto policy described in the above paragraph has been known to supervisory and policymaking personnel of the Sheriff's Department of Pima County for a substantial period of time.

XVIII

Despite their knowledge of the

above-described illegal policy and practice, the supervisory and policymaking officers and officials of the Sheriff's Department and Pima County have not taken steps to terminate the practices, have not disciplined or otherwise properly supervised the individual officers who engage in the practices, have not effectively trained Sheriff's officers with regard to the proper constitutional and statutory limits on the exercise of their authority, and have instead sanctioned the policy and practices described above through their deliberate indifference to the effect of the policy and practices upon the constitutional rights of the residents and visitors to Pima County, Arizona.

XIX

As a result of the acts detailed above, Plaintiffs have suffered physical injury as well as other painful mental injuries and emotional distress, deprivation of liberty, property, invasion of privacy, and pain and suffering, all in violation of 42 U.S.C

§§1981, 1983 and the First, Fourth, Fifth and Fourteenth Amendments and the law of the State of Arizona.

XX

The Defendant, Pima County, having caused the violations of Plaintiffs' rights, is liable under §§1981 and 1983 and the First, Fourth, Fifth and Fourteenth Amendments to the Plaintiffs for their injuries.

WHEREFORE, Plaintiffs and each of them, request the following relief jointly and severally against all Defendants.

Compensatory damages, punitive damages, reasonable attorney's fees and costs, and such other and further relief as appears reasonable and just under the circumstances, including equitable and declaratory relief against Defendant Pima County and the Pima County Sheriff.

DATED this _____ day of May, 1981

STOMPOLY & EVEN, P.C.

By_____
Barry Kirschner
Attorney for Plaintiffs

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: RICHARD N. ROYLSTON Case No. 194821

Court Reporter: none Date May 23, 1983

JAMES MORAN, etc., et al.,

Plaintiff,

vs.

CLARENCE DUPNIK, et al.,

Defendant,

MINUTE ENTRY

UNDER ADVISEMENT:

The Court having considered Plaintiffs' Motion for Attorney's Fees and Plaintiffs' Motion for Evidentiary Hearing, Re: Proper Amount of Attorney's Fees to be Awarded,

IT IS ORDERED that said motions are DENIED.

It is requested that the attorneys for the Plaintiffs prepare a written judgment.

cc: Stompoly & Even
County Attorney - Civil Div. - D. Berkman
Civil Desk
Under Advisement Clerk

ARIZONA SUPERIOR COURT, PIMA COUNTY

JAMES MORAN, etc., et al., Plaintiffs,	)	NO. 194821
v.	)	
CLARENCE DUPNIK, et al., Defendants.	)	JUDGMENT

The above captioned case having come on for trial and the jury having rendered a verdict,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff James Moran on behalf of MICHAEL MORAN be awarded $500;

2. That all other plaintiffs be awarded zero;

3. That there be no assessment of jury costs;

4. That Plaintiffs' Motion for Attorney's Fees and Plaintiffs' Motion for Evidentiary Hearing regarding the proper amount of attorney's fees to be awarded are denied;

5. That non-jury "costs" shall be assessed against:

A. Plaintiffs _____

B. Defendants ✓
C. Neither Party _____

DONE IN OPEN COURT this _____ day of June, 1983.

HONORABLE RICHARD N. ROYLSTON
Judge of the Superior Court

Copy of the foregoing delivered
this 29th day of June, 1983, to:

DAVID L. BERKMAN, ESQ.
Deputy County Attorney
Attorneys for Defendants
111 W. Congress, 9th Floor
Tucson, Az. 85701

ARIZONA SUPERIOR COURT, PIMA COUNTY

JAMES MORAN, etc., et al.,	)	
	)	
Plaintiffs,	)	NO. 194821
	)	
v.	)	
	)	OFFER OF PROOF
CLARENCE DUPNIK, et al.,	)	RE: ATTORNEY'S
	)	FEES
Defendants.	)	
	)	

Plaintiffs submit the attached Affidavits of BARRY KIRSCHNER and ELLIOT A. GLICKSMAN as an offer of proof to the record the would have been made had the Court granted Plaintiffs' Motion for Evidentiary Hearing regarding the matter of attorney's fees. The Affidavits are attached as Exhibits "A" and "B".

Respectfully submitted this 15th day of July, 1983.

STOMPOLY & EVEN, P.C
Attorneys for Plaintiffs

By_____
Barry Kirschner

Copy hereof delivered this
15th day of July, 1983 to:

DAVID BERKMAN, ESQ.
Office of Pima County Attorney's Office
Attorneys for Defendants, 111 W. Congress
9th Floor, Tucson, Az. 85701

ARIZONA SUPERIOR COURT, PIMA COUNTY

JAMES MORAN, etc., et al.	)	
	)	
Plaintiffs,	)	NO. 194821
	)	
v.	)	
	)	AFFIDAVIT
CLARENCE DUPNIK,	)	
	)	
Defendants.	)	
	)	

STATE OF ARIZONA)
) SS.
COUNTY OF PIMA)

BARRY KIRSCHNER, being first duly sworn, on his oath, deposes and says:

1. I am Barry Kirschner, an attorney with the law firm of STOMPOLY & EVEN, P.C.

2. I have caused the accounting department of Stompoly & Even, P.C. to calculate the number of hours spent by each of the attorneys working on the case, and to calculate the amount which would have been billed to an ordinary client paying the regular hourly rate for each of these attorneys, and to total these sums for all of these attorneys.

3. The attached Exhibit "A" reflects accumulations from time sheets kept in the

ordinary course of business by attorneys and law clerks for the law firm of Stompoly & Even, P.C., and reflects a total billable amount at the normal hourly rate for each of the attorneys and law clerks of $13,104.90 attributable to this case as of the last day of May, 1983.

4. I am familiar with the quality of work performed by each of the attorneys for plaintiffs, and that their hourly rates are reasonable in Pima County, Arizona's legal community.

5. If allowed to have had an evidentiary hearing on the matter of attorney's fees, affiant would have testified consistently with this affidavit, as would witness ELLIOT A. GLICKSMAN have testified consistent with the affidavit submitted on behalf of plaintiffs with the accompanying offer of proof.

6. The representation of JAMES MORAN in and for MICHAEL MORAN represented by far the majority of time required by attorneys in

this case and that had this case been solely prosecuted on behalf of MICHAEL MORAN, the amount of time spent by attorneys for Plaintiffs would have been approximately 90% of the time spent for all plaintiffs.

Further affiant sayeth not.

BARRY KIRSCHNER

SUBSCRIBED AND SWORN to before me this _____ day of July, 1983.

Notary Public

My Commission Expires:

_____

Copies of attorney time sheets were attached to original Affidavit but are not attached here in order to save space in this petition.

EXHIBIT "A"

ARIZONA SUPERIOR COURT, PIMA COUNTY

JAMES MORAN, etc., et al, Plaintiffs,	)	NO. 194821
v.	)	AFFIDAVIT
CLARENCE DUPNIK, Defendants.	)	

STATE OF ARIZONA)
) SS.
COUNTY OF PIMA)

ELLIOT A. GLICKSMAN, being first duly sworn, on his oath, deposes and says:

1. I am Elliot A. Glicksman, an attorney in good standing with the Arizona Bar, practicing law in Pima County, Arizona since 1979.

2. I have taken cases of police misconduct and/or violations of civil rights to completion at jury trial or settlement and I believe I am one of, if not the most experienced plaintiff's attorney in police misconduct litigation from the plaintiff's side in Pima County, Arizona, since I have been practicing law.

3. I have reviewed the file in the case

of Moran v. Dupnik, et al, Cause No. 19482, and am familiar with the reputations and claiber of work performed by the attorneys for Plaintiffs.

4. I have seen accounting sheets kept by the law firm of Stompoly & Even, P.C. reflecting the time spent by each of the Stompoly & Even, P.C. attorneys, the hourly rates of each of these attorneys, and the calculation that the total of the fees, if billed at the normal rate for each of these attorneys as of May 31, 1983, is $13,104.90.

5. The figure recited immediately above is a reasonable sum reflected for the difficulty of the case, quality of the attorneys, and reasonableness of the hourly rates charged by each of the attorneys.

6. The case of Moran v. Dupnik was a very difficult case for the plaintiffs to prove liability, a case in which the amount of damages which could reasonably have been expected after proof of liability was relatively small, and generally the type of case

which private attorneys could not afford to prosecute diligently without the prospect for court-awarded attorney's fees upon successful verdict.

Further affiant sayeth not.

_____
ELLIOT A. GLICKSMAN

SUBSCRIBED AND SWORN to before me this _____ day of July, 1983.

_____
Notary Public

My Commission Expires:

_____

§1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matter conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the

cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1989 and 1981 of the Revised Statutes [42 USCS §§1981-1983, 1985, 1986], title IX of PUblic Law 92-318 [20 USCS §§1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [25 USCS §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§2000d et seq.], the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
(R.S. §722; Oct. 19, 1976, P.L. 94-559, §2, 90 Stat. 2641.)

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

JAMES MORAN, as father to his minor son, MICHAEL MORAN, and guardian to his adult son, THOMAS MORAN; KAREN BARKE, in and for herself and her minor daughter, TINA BARKE, Plaintiffs/Appellants, vs. PIMA COUNTY, a body politic, organized under the laws of the State of Arizona; PIMA COUNTY SHERIFF CLARENCE DUPNIK, in his capacity as Pima County Sheriff; SGT. TONY CALLAN, individually and as a Sheriff's Deputy; and DEPUTY TIM HUGHES, individually and as a Sheriff's Deputy. Defendants/Appellees.	NO. 2 CA-CIV 5009 OPINION

Appeal from the Superior Court of Pima County

Cause No. 194821

Honorable Richard N. Roylston, Judge

AFFIRMED

Stompoly & Even, P.C.
By David L. Horley Tucson

Attorneys for Plaintiffs/Appellants

Appendix G

Stephen D. Neely, Pima County Attorney
By David L. Berkman and Tom Dugal Tucson

Attorneys for Defendants/Appellees

B I R D S A L L, Chief Judge.

The appellant, James Moran as guardian of his minor son, Michael Moran, appeals from the trial court's denial of his request for attorney fees. The complaint in the trial court alleged violations of Michael's civil rights by deputies of the Pima County Sheriff. 42 U.S.C. §1988 provides generally that in a civil rights action,

> "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

The parties agree that that federal statute is applicable in this state court proceeding. See Thiboutot v. State, 405 A.2d. 230 (Me. 1979), aff'd, 448 U.S. 1 (1980). However, the appellant contends the denial of fees was an abuse of discretion. As a subissue he contends the trial court erred in failing to enumerate the reasons for its decision.

The appellant seeks to have the case remanded with a direction to award reasonable fees. We affirm.

The civil rights violation occurred when the deputies mistakenly arrested Michael at a miniature golf course in Tucson. Three other persons who were with Michael at the time were also plaintiffs in the superior court. All were represented by the same counsel. The case was tried to a jury. The jury returned a compensatory damage verdict in favor of Michael in the amount of $500. No other plaintiff recovered and no punitive damages were awarded. This appeal was taken by all of the plaintiffs but since the only issue presented is the denial of fees and the other plaintiffs were not prevailing parties, we dismiss the appeal as to all the appellants except Michael.

Attorney fees were requested in the complaint and after the verdict was returned the appellant moved for an evidentiary

hearing to determine the amount of attorney fees to be awarded. The written motion was filed with an accompanying legal memorandum. The appellees opposed the allowance of any fees and also submitted a memorandum. The trial court denied the motion for a hearing and denied any fees. Subsequently the appellant filed a written offer of proof reflecting attorney fees for services for all plaintiffs in the amount of $13,104.90. The affidavit of appellant's counsel, included in the offer, averred that 90 percent of the time charged was for Michael. The offer also contained an affidavit of attorney Elliot Glicksman in support of the reasonableness of the amount of the requested fees over $13,000.

Although the trial court articulated no reason for the ruling, we believe obvious reasons appear in the record. First and foremost is the amount of the damage award. At best this was a moral and pyrrhic victory only. In Huntly v. Community School Board

of Brooklyn, New York District No. 14, 579 F.2d. 738 (2d Cir. 1978), the federal court held that there was no abuse of discretion in the conclusion of the trial judge that appellant had at most won a "moral victory" of insufficient magnitude to warrant an award under §1988. The award in Huntly was $100. Other federal decisions reach this same result. See New York City Unemployed and Welfare Council v. Brezenoff, 742 F.2d 718 (2nd Cir. 1984); Drake v. Perrin, 593 F. Supp. 1178 (E.D. Pa. 1984). We find the Huntley holding most appropriate in the instant case where the award is only $500. See also Naprstek v. Norwich, 433 F. Supp. 1369 (N.D.N.Y. 1977).

It has always been proper to consider the amount involved and the results obtained in determining the reasonableness of the amount of attorney fees. Schwartz v. Schwerin, 85 Ariz. 242, 336 P.2d 144 (1959). These same factors have been included in guidelines expressed by the court in civil

rights litigation. Indeed the United States Supreme Court has held that the degree of sucess obtained is the most critical factor in determining a fee award in civil rights litigation. Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d. 40 (1983). And see Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). We also believe the results in the trial of this case constitute a special circumstance justifying denial of any award. See Northcross v. Board of Education of the Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

For all we know form the record on appeal, this case was nothing more than a case of false arrest and simple assault dressed in 1983 clothing. [1/] Although it fit within civil rights litigation, the result obtained is identical to a verdict in a tort claim for false arrest and simple assault except for the possible allowance of attorney fees. We believe this is another fact the trial

court could have properly considered in denying fees. See Drake v. Perrin, supra.

The trial court's determination regarding an award under §1988 will not be disturbed absent a clear abuse of discretion. Hensley v. Eckerhard, supra; see also Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 sub nom. Perkins v. Screen Extras Guild, Inc. (1976); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d. 190 (9th Cir.) cert. denied, 379 U.S. 880 (1964). We find no such abuse of discretion in the instant case where only one of four plaintiffs won and he was given only a nominal award. It was within the court's discretion to deny any fee.

The trial court did not need to hear further evidence and the lack of an evidentiary hearing has not hampered our review of this record because of the memoranda and offer of proof filed in the trial court.

However, the trial court should have

stated the reasons for the denial of fees. The federal cases interpreting §1988 require that this be done. In Hensley v. Eckerhart, supra, the Supreme Court said it is important for the district court to provide a concise but clear explanation of its reasons for the fee award. Since the federal statute is binding in this state court proceeding, we believe that the state courts should also adopt this requirement. We hold that in civil rights litigation where attorney fees are sought under 42 U.S.C §1988 the trial court must state the reasons for its decision on attorney fees. While the failure to explain the denial of fees in the instant case is error, we need not remand in view of the obvious explanation arising from the de minimus award.

Both parties have requested attorney fees on appeal. In our discretion we will not award any fees.

Affirmed.

1/ 42 U.S.C §1983.

BEN C. BIRDSALL,
Chief Judge.

CONCURRING:

LAWRENCE HOWARD, Judge.

JAMES D. HATHAWAY, Judge.

March 20, 1985

Re: MORAN et al vs. PIMA COUNTY et al
Supreme Court No. 17978-PR
Court of Appeals No. 2 CA-CIV 5009
Pima County No. 194821

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 19, 1985, in regard to the above-referenced cause:

"ORDERED: Petition for Review = DENIED"

Record returned to the Court of Appeals, Division Two, Tucson, this 20th day of March, 1985.

S. ALAN COOK, Clerk

TO: David L. Horley, Esq., Stompoly & Even
Stephen D. Neely, Pima County Attorney - Attn: David L. Berkman, Esq., and Tom Dugal, Esq.
Elizabeth Urwin Fritz, Clerk, Court of Appeals, Division Two

eh

OPPOSITION

BRIEF

85-58 (2)

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MORAN

v.

PIMA COUNTY

RESPONSE TO WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

GEOFFREY CHEADLE, JR.
DEPUTY COUNTY ATTORNEY
PIMA COUNTY ATTORNEY'S OFFICE
177 N. Church, 3rd Fl.
Tucson, Arizona 85701
602-792-8321
Counsel for Respondant

34 pp

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MORAN

v.

PIMA COUNTY

RESPONSE TO WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

GEOFFREY CHEADLE, JR.
DEPUTY COUNTY ATTORNEY
PIMA COUNTY ATTORNEY'S OFFICE
177 N. Church, 3rd Fl.
Tucson, Arizona 85701
602-792-8321
Counsel for Respondant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATMENT OF THE CASE

Respondent objects to the petitioner's statement of the case in that it omits certain pertinent facts essential to a full and accurate statement. Respondent therefore presents this additional statement.

Petitioner, Michael Moran, the plaintiff below and three other individuals, brought this lawsuit against the respondent, Pima County, alleging false arrest, assault and battery, infliction of emotional distress and violation of their civil rights. Plaintiffs alleged in their complaint that they had suffered physical injuries as well as painful mental injuries and emotional distress.

The complaint asked for both monetary and equitable relief. However, the case proceeded to trial with the plaintiffs asking only for monetary relief.

At the conclusion of a five-day jury trial, the plaintiffs asked the jury to award

each of them several thousand dollars. However, the jury returned a verdict for only one of the plaintiffs, Michael Moran, and only awarded him five hundred dollars. Appendix A.

Thereafter, the trial court asked the parties to submit memorandums regarding petitioner Moran's attorneys' fees. Appendix A. Both petitioner and respondent submitted memorandums regarding petitioner Moran's entitlement to attorneys' fees under the Civil Rights Attorney's Fees Awards Act. After considering these memorandums, the trial court denied petitioner's request for fees. Appendix B.

Subsequently, the petitioner filed a written offer of proof, which stated that the attorneys' fees for plaintiffs' counsel on the case was $13,104.90, and that ninety percent of the time charged was for the

petitioner. A notice of appeal was then filed by the petitioner.

On January 2, 1983, the Arizona Court of Appeals affirmed the trial court's order denying fees. The Court of Appeals held that while the trial court should have set forth its reasons for denying fees, that in light of the record, including the memoranda and offer of proof submitted to the trial court on the issue of fees, that the trial court's failure to set forth reasons did not prevent meaningful review, and that based upon the record, the trial court's denial of fees was not an abuse of discretion. Appendix C.

On January 17, 1985, the petitioner tiled a petition for review with the Arizona Supreme Court. On March 19, 1985, the Arizona Supreme Court denied review. This petition followed.

ARGUMENT

The Arizona Court of Appeals decision, affirming the trial court's denial of attorney fees, is correct. There is no conflict with federal law.

I

THE ARIZONA COURT OF APPEALS DID NOT DISREGARD FEDERAL LAW BY HOLDING THAT THE TRIAL COURT'S FAILURE TO STATE ITS REASONS FOR DENYING FEES DID NOT REQUIRE REVERSAL IN THIS PARTICULAR CASE.

Petitioner claims that the Arizona Court of Appeals disregarded federal law by not remanding the case to the trial court for the purpose of having the trial court state on the record why it denied attorney's fees. This is incorrect.

In its decision, the Arizona Court of Appeals recognized that federal court decisions have required the district courts to articulate their reasons for denying fees.

E.g., Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The Arizona court stated that the state courts should follow the same procedure, and state their reasons for denying fees.

However, the Arizona appellate court went on to state that while the trial court's failure to state its reasons for denying fees was in error, it did not require remand in this particular case. The reason is that based upon the record, including the memoranda and offer of proof submitted to the trial court on the subject of attorneys' fees, the appellate court's review of the case was not impaired.

This decision by the appellate court not to remand the case was neither improper nor a violation of federal law. This is particularly true in light of the appellate court's declaration that its review of the case was not impaired.

In such a situation, it makes no sense to remand the case. Remanding the case would only add to unnecessary delays, litigation costs, and use of court time.

In similar situations, courts have refused to remand a case. For example, in Davis v. City of Abbeville, 633 F.2d 1161 (5th Cir. 1981), it was held that the failure of its district court to articulate reasons for setting a fee was not an abuse of discretion necessitating remand, where the record showed that the trial court had before it plaintiff's memorandum articulating the factors to consider in awarding fees, and the record showed that the trial court had not abused its discretion. See also Wolf v. Frank, 555 F2d 1213, 1217 (1977) (even though the trial court did not discuss all the relevant factors to consider in awarding fees, there was no reason to remand the case

in light of the record allowing the appellate court to review the matter).

Each of these cases recognized that because the record was such as to allow meaningful review, no useful purpose would be served by remanding the case. The same situation exists in this case.

The Arizona Court stated that based upon the record, its review was not impaired, and therefore, remanding the case was unnecessary. That decision was correct, and not inconsistent with Federal law.

II

THE ARIZONA COURT OF APPEALS DID NOT ERROR IN CONSIDERING THE PETITIONER'S DE MINIMIS SUCCESS IN THE CASE AS ONE FACTOR SUPPORTING THE DENIAL OF FEES.

The petitioner claims that the Arizona Court of Appeals errored in finding that the petitioner's negligible recovery was a factor supporting the denial of fees. This is incorrect.

The extent to which a plaintiff has prevailed is an important factor to consider in awarding fees. Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The United States Supreme Court has called it the most critical factor to consider. Id. 103 S.Ct. at 1941.

Applying this principle, the extent to which the amount of recovery reflects the degree of a plaintiff's success, depends upon the facts of the particular case. If a plaintiff's case is small, then a small recovery might indicate complete success. On the other hand, if a plaintiff seeks substantial damages, and recovers only nominal damages, the amount of the recovery might indicate only de minimis success.

In his petition for certiorati, petitioner claims that his case was a minor one. The suggestion petitioner attempts to

make is that his five hundred dollar verdict was a complete success.

However, petitioner's claim belies his actions in the case and the results obtained. Petitioner sought substantial monetary damages in this case. Following a five day jury trial, at the conclusion of which he and the other three plaintiffs asked for several thousand dollars each, the jury awarded only five hundred dollars to the petitioner.

The limited success achieved by the petitioner was properly considered by its Arizona courts as an important factor supporting the denial of attorneys' fees. As the Arizona court pointed out, petitioner achieved at best a moral and pyrrhic victory.

In Huntley v. Community School Board of Brooklyn, 579 F.2d 738 (2nd Cir. 1978), it was held that where the plaintiff had obtained only one hundred dollars in nominal

damages in a civil rights action, it was not error for the trial judge to deny an award of fees. According to the court in Huntley, the plaintiff won at best, a moral victory of insignificant magnitude to warrant an award of fees.

Other federal courts have also denied fees on the basis that the plaintiff's level of success was de minimis. E.g. New York City Unemployed and Welfare Council v. Brezenoff, 742 F.2d 718 at n.4 (2nd Cir. 1984); Naprstek v. City of Norwich, 433 F.Supp. 1369 (D.C. N.Y. 1977) Each of these cases recognized that a denial of fees was reasonable in relation to the results obtained.

Similarly in this case, the Arizona court found that a denial of fees was reasonable in relation to the de minimis results obtained by the petitioner. That

decision was correct, not inconsistent with federal law, and not an abuse of discretion.

III

THE ARIZONA COURT OF APPEALS DID NOT ERROR IN TAKING INTO CONSIDERATION ON THE ISSUE OF ATTORNEY'S FEES, THAT PETITIONER'S CAUSE OF ACTION WAS NEITHER COMPLEX NOR ONE INVOLVING ANY NOVEL CONSTITUTIONAL ISSUES, BUT RATHER WAS A STRAIGH FORWARD CASE OF FALSE ARREST AND SIMPLE ASSAULT.

Petitioner claims that the Arizona Court of Appeals errored in taking into consideration that petitioner's cause of action was nothing more than a straight forward case of false arrest and simple assault. This is incorrect.

The Arizona Court of Appeal did not deny petitioner's request for fees on the basis that the case was one involving false arrest and simple assault. To the contrary, the court recognized that claims of false arrest and simple assualt can be the basis of a civil rights claim, and thus, a basis for

attorneys' fees under the civil rights act. However, the court also recognized that as to these or any other action, their complexity or lack thereof and the results obtained are factors to consider in measuring the degree of the plaintiff's success.

Specifically, the Arizona Court cited Drake v. Perrin, 593 F.Supp. 1176 (E.D. Penn. 1984), where the plaintiff recovered two dollars in a civil rights action involving false arrest, false imprisonment, and assault. In discussing the plaintiff's request for attorneys' fees, the court in Drake noted that the case involved only simple state torts of assault and battery and false imprisonment. According to the court, the fact that it was dressed in the clothing of §1983 added nothing to its complexity or its impact. It established no new or profound constitutional principles. Its vindication of civil rights was little more,

if any, than that of a state court verdict under purely state claims.

Similarly in this case, petitioner's claims of false arrest and assault were neither complex nor ones involving novel constitutional principles. The court's consideration of these factors was certainly relevant on the issue of petitioner's claim for fees, and was not inconsistent with federal law. Considering also the petitioner's de minimis success on these claims, it cannot be said that the Arizona courts abused their discretion by denying fees.

CONCLUSION

The Arizona courts did not error by denying petitioner attorneys' fees in this case. The legal considerations upon which the Arizona courts based their decisions were correct and consistent with federal law. In addition, denial of fees in this case was

reasonable in light of the de minimis success achieved by the petitioner. As such, it cannot be said that the Arizona courts abused their discretion.

For these reasons, petitioner's request for relief should be denied.

Respectfully submitted this 15 day of October, 1985.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By _____
Geoffrey Chéadle, Jr.
Deputy County Attorney

CERTIFICATE OF MAILING

1. My name is Geoffrey Cheadle, Jr. and I am the attorney for the Resondant before this Court.

2. That on October 2nd 1985 a member of the staff of the County Attorney's Office, deposited in the United States mail, with first-class postage prepaid addressed to the Clerk of the Supreme Court, 40 copies of our Petition for Writ of Certiorari in Moran v. Pima County, and 3 copies to the offices of Stompoly & Even.

3. To my knowledge, the mailing took place on October 2nd 1985, within the time permitted for answering a Petition for Writ of Certiorari.

Geoffrey Cheadle, Jr.
Deputy County Attorney

STATE OF ARIZONA)
) ss.
County of Pima)

SUBSCRIBED AND SWORN to before me this 2nd day of October, 1985, by Geoffrey Cheadle, Jr., attorney for Respondant.

Notary Public

My commission expires:

3-15-86

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: RICHARD N. ROYLSTON Case No. 194821

Date: May 25, 1983

JAMES MORAN, etc., et al. Barry Kirschner
Plaintiff's
Plaintiffs Attorney

vs.

CLARENCE DUPNIK, et al., David Berkman
Defendant's
Defendants Attorney

MINUTE ENTRY

JURY TRIAL - FIFTH DAY:

9:45 a.m. The Jury commences deliberations.

10:50 a.m. Parties not present.

No Court Reporter

Comes now the Jury, under the charge of the bailiff, and through their foreman announce that they have arrived at a verdict.

The Clerk reads the verdict of We, the Jury, duly impaneled and sworn in the above-entitled action, upon our oaths, do find in favor of the Plaintiff, James Moran,

as guardian of Michael Moran, and against the Defendants, Timothy Hughes and Anthony Callan, and assess compensatory damages in the sum of $500.00.

The Clerk inquires of the Jurors as to whether this is their verdict and the verdict of each of them who signed, and they reply that it is and so say they all.

The Jury is dismissed.

The Court states that at the request of Mr. Kirschner, the Court questioned the Jurors and is informed by the Jury that by finding only in favor of one Plaintiff, Michael Moran, through his guardian, that it was their intent to find against all other Plaintiffs, and in favor of the Defendants on all other Plaintiffs' claims.

IT IS ORDERED that there be no assessment in favor of the Clerk of the Superior Court for jury fees.

IT IS ORDERED that Mr. Kirschner is given two (2) weeks within which to file a memorandum concerning attorneys' fees and Mr. Berkman is given one (1) week thereafter to file a response, and at that time, the matter will be deemed submitted and taken under advisement.

Filed in Court: Jury Lists, Verdicts (10), Plaintiffs' Jury Instructions and Defendants' Jury Instructions.

cc: Stompoly & Even
County Attorney - Civil Division - David Berkman
Civil Desk
U/A Clerk
Court Admr.

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: RICHARD N. ROYLSTON Case No. 194821

Court Reporter: none

Date May 23, 1983

JAMES MORAN, etc., et al.,

Plaintiff

vs.

CLARENCE DUPNIK, et al.,

Defendant.

MINUTE ENTRY

UNDER ADVISEMENT:

The Court having considered Plaintiffs' Motion For Attorney's fees and Plaintiffs' Motion for Evidentiary Hearing, Re: Proper Amount of Attorney's Fees to be Awarded,

IT IS ORDERED that said motions are DENIED.

It is requested that the attorneys for the Plaintiffs prepare a written judgment.

cc: Stompoly & Even
County Attorney - Civil Division - D. Berkman
Civil Desk
Under Advisement Clerk

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

JAMES MORAN, as father to his minor son, MICHAEL MORAN, and guardian to his adult son, THOMAS MORAN; KAREN BARKE, in and for herself and her minor daughter, TINA BARKE, Plaintiffs/Appellants, vs. PIMA COUNTY, a body politic, organized under the laws of the State of Arizona; PIMA COUNTY SHERIFF CLARENCE DUPNIK, in his capacity as Pima County Sheriff; SGT. TONY CALLAN, individually and as a Sheriff's Deputy; and DEPUTY TIM HUGHES, individually and as a Sheriff's Deputy. Defendants/Appellees.	NO. 2 CA-CIV 5009 OPINION

Appeal from the Superior Court of Pima County

Cause No. 194821

Honorable Richard N. Roylston, Judge

AFFIRMED

Stompoly & Even, P.C.
By David L. Horley Tucson

Attorneys for Plaintiffs/Appellants

Stephen D. Neely, Pima County Attorney
By David L. Berkman and Tom Dugal Tucson

Attorneys for Defendants/Appellees

B I R D S A L L, Chief Judge.

The appellant, James Moran as guardian of his minor son, Michael Moran, appeals from the trial court's denial of his request for attorney fees. The complaint in the trial court alleged violations of Michael's civil rights by deputies of the Pima County Sheriff. 42 U.S.C. §1988 provides generally that in a civil rights action,

> "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

The parties agree that that federal statute is applicable in this state court proceeding. See Thiboutot v. State, 405 A.2d. 230 (Me. 1979), aff'd, 448 U.S. 1 (1980). However, the appellant contends the denial of fees was an abuse of discretion. As a subissue he contends the trial court erred in failing to enumerate the reasons for its decision.

The appellant seeks to have the case remanded with a direction to award reasonable fees. We affirm.

The civil rights violation occurred when the deputies mistakenly arrested Michael at a miniature golf course in Tucson. Three other persons who were with Michael at the time were also plaintiffs in the superior court. All were represented by the same counsel. The case was tried to a jury. The jury returned a compensatory damage verdict in favor of Michael in the amount of $500. No other plaintiff recovered and no punitive damages were awarded. This appeal was taken by all of the plaintiffs but since the only issue presented is the denial of fees and the other plaintiffs were not prevailing parties, we dismiss the appeal as to all the appellants except Michael.

Attorney fees were requested in the complaint and after the verdict was returned the appellant moved for an evidentiary

hearing to determine the amount of attorney fees to be awarded. The written motion was filed with an accompanying legal memorandum. The appellees opposed the allowance of any fees and also submitted a memorandum. The trial court denied the motion for a hearing and denied any fees. Subsequently the appellant filed a written offer of proof reflecting attorney fees for services for all plaintiffs in the amount of $13,104.90. The affidavit of appellant's counsel, included in the offer, averred that 90 percent of the time charged was for Michael. The offer also contained an affidavit of attorney Elliot Glicksman in support of the reasonableness of the amount of the requested fees over $13,000.

Although the trial court articulated no reason for the ruling, we believe obvious reasons appear in the record. First and foremost is the amount of the damage award. At best this was a moral and pyrrhic victory only. In Huntly v. Community School Board

of Brooklyn, New York District No. 14, 579 F.2d. 738 (2d Cir. 1978), the federal court held that there was no abuse of discretion in the conclusion of the trial judge that appellant had at most won a "moral victory" of insufficient magnitude to warrant an award under §1988. The award in Huntly was $100. Other federal decisions reach this same result. See New York City Unemployed and Welfare Council v. Brezenoff, 742 F.2d 718 (2nd Cir. 1984); Drake v. Perrin, 593 F. Supp. 1178 (E.D. Pa. 1984). We find the Huntley holding most appropriate in the instant case where the award is only $500. See also Naprstek v. Norwich, 433 F. Supp. 1369 (N.D.N.Y. 1977).

It has always been proper to consider the amount involved and the results obtained in determining the reasonableness of the amount of attorney fees. Schwartz v. Schwerin, 85 Ariz. 242, 336 P.2d 144 (1959). These same factors have been included in guidelines expressed by the court in civil

rights litigation. Indeed the United States Supreme Court has held that the degree of sucess obtained is the most critical factor in determining a fee award in civil rights litigation. Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d. 40 (1983). And see Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). We also believe the results in the trial of this case constitute a special circumstance justifying denial of any award. See Northcross v. Board of Education of the Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

For all we know form the record on appeal, this case was nothing more than a case of false arrest and simple assault dressed in 1983 clothing. [1/] Although it fit within civil rights litigation, the result obtained is identical to a verdict in a tort claim for false arrest and simple assault except for the possible allowance of attorney fees. We believe this is another fact the trial

court could have properly considered in denying fees. See Drake v. Perrin, supra.

The trial court's determination regarding an award under §1988 will not be disturbed absent a clear abuse of discretion. Hensley v. Eckerhard, supra; see also Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 sub nom. Perkins v. Screen Extras Guild, Inc. (1976); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d. 190 (9th Cir.) cert. denied, 379 U.S. 880 (1964). We find no such abuse of discretion in the instant case where only one of four plaintiffs won and he was given only a nominal award. It was within the court's discretion to deny any fee.

The trial court did not need to hear further evidence and the lack of an evidentiary hearing has not hampered our review of this record because of the memoranda and offer of proof filed in the trial court.

However, the trial court should have

stated the reasons for the denial of fees. The federal cases interpreting §1988 require that this be done. In Hensley v. Eckerhart, supra, the Supreme Court said it is important for the district court to provide a concise but clear explanation of its reasons for the fee award. Since the federal statute is binding in this state court proceeding, we believe that the state courts should also adopt this requirement. We hold that in civil rights litigation where attorney fees are sought under 42 U.S.C §1988 the trial court must state the reasons for its decision on attorney fees. While the failure to explain the denial of fees in the instant case is error, we need not remand in view of the obvious explanation arising from the de minimus award.

Both parties have requested attorney fees on appeal. In our discretion we will not award any fees.

Affirmed.

1/ 42 U.S.C §1983.

BEN C. BIRDSALL,
Chief Judge.

CONCURRING:

LAWRENCE HOWARD, Judge.

JAMES D. HATHAWAY, Judge.

OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

JAMES MORAN, ETC., ET AL. *v.* PIMA COUNTY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA, DIVISION TWO

No. 85-58. Decided November 12, 1985

The petition for writ of certiorari is denied.

JUSTICE WHITE, dissenting.

Petitioner Moran filed this suit in Pima County Superior Court against respondents Pima County, Arizona, and various of its law enforcement officials. In his complaint, Moran alleged unlawful arrest, detention, and excessive use of force and sought relief under 42 U. S. C. § 1981 and § 1983. The case was tried to a jury, and the jury awarded Moran $500 in damages. The Superior Court summarily denied Moran's motion for attorney's fees under 42 U. S. C. § 1988. The Arizona Court of Appeals affirmed this denial, concluding in part that the "moral victory" that the verdict represented was not sufficient to warrant an award of attorney's fees under § 1988. See 700 P. 2d, at 882. The Supreme Court of Arizona denied review.

The Arizona Court of Appeals' decision in this case is in accord with Circuit decisions that have held that a plaintiff receiving only nominal damages is not truly prevailing and is therefore not entitled to attorney's fees. See, *e. g.*, *Fast* v. *School Dist. of City of Ladue*, 712 F. 2d 379, 380 (CA8 1983); *Huntley* v. *Community School Board of Brooklyn*, 579 F. 2d 738, 742 (CA2 1978). This conclusion, however, has been rejected by other Circuits. See *Skoda* v. *Fontani*, 646 F. 2d 1193, 1194 (CA7 1981) *(per curiam)*; *Burt* v. *Abel*, 585 F. 2d 613, 617–618 (CA4 1978). I would grant certiorari to resolve this conflict.